



U.S. Department of Energy



Office of Small and Disadvantaged Business Utilization



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THE WASHINGTON STATE
CONVENTION AND TRADE CENTER



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Bid Protests at GAO

The Role of the Government Accountability Office in
Resolving Complaints by Disappointed Bidders in
Federal Acquisitions.

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Bid Protests at GAO

- GAO's Bid Protest Function began in the 1920s and was codified in the Competition in Contracting Act of 1984 (CICA).
- CICA Directs GAO to provide for the independent, expeditious and inexpensive resolution of protests.
- GAO's protest decisions establish a uniform body of law relied on by Congress, the courts, contracting agencies and the public.

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Competing Demands on Protest System

- Provide a forum to **hear complaints** by, and **grant relief** to, interested parties.
- Enhance **accountability** of procurement officials and government agencies.
- Promote the **transparency** of the procurement system.
- Protect the **integrity** of procurement system.
- Minimize **cost** and **delay & disruption** of procurements during protest process.

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Some numbers...

- Of the hundreds of thousands of solicitations and contract awards each year...
- GAO received nearly **1,300** protests in 2005.
- Approximately 25 percent of protests filed in the last 12 months have been sustained.
- In comparison, the Court of Federal Claims received approximately **68** protests in 2005.

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GAO strives for balance...

- . . . Between the need to hold agencies accountable and protect aggrieved offerors' due process rights . . .

And

- . . . The need to ensure that the government procurement process can proceed without undue disruption.

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Holding agencies accountable and protecting aggrieved offerors' due process rights

- Broad jurisdiction:
 - A protest can challenge any federal agency's procurement.
 - Anyone who submitted an offer can protest.
- Process is relatively inexpensive and informal.
- “*Automatic stay*” usually stops agency from proceeding with acquisition.

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Holding agencies accountable and protecting aggrieved offerors' due process rights

- Agency must provide full report to GAO.
- Protester has chance to respond to report.
- GAO may hold hearing or otherwise seek further information.
- Protesters frequently supplement their protests once they receive the agency report.
- Alternative dispute resolution (ADR) has been promoted in the last 10 years.

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Holding agencies accountable and protecting aggrieved offerors' due process rights

- GAO will *sustain* protest if agency violated procurement law to detriment of protester.
- GAO will recommend remedy appropriate to problem, and reimbursement of protest costs.
- GAO's recommendations almost always followed.

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Ensuring that the government procurement process can proceed without undue disruption

- Strict time limits on filing protests.
- GAO has only 100 days to issue decision.
- GAO resolves most protests well before 100-day deadline.

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Ensuring that the government procurement process can proceed without undue disruption

High standard to be met before GAO will sustain protest:

- GAO must find agency violated procurement statute or regulation.
- GAO must find violation prejudiced protester.
- Mere disagreement with agency's judgment is insufficient for GAO to sustain a protest.

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Ensuring that the government procurement process can proceed without undue disruption

GAO strictly respects limits on its jurisdiction:

- No contract administration issues.
- No issues reserved for other agencies.

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Procedures: The Practice at GAO

- GAO dismisses many protests within first 3 weeks after filing, either because they are based on mere speculation, untimely, or otherwise procedurally deficient.
- A decision by agency to reconsider or reverse its actions will usually lead GAO to dismiss protest.
- Early dismissals eliminate need for report from agency.

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Who May Protest?

- By law, a GAO protest can only be filed by an **interested party**, which means an actual or prospective bidder or offeror with a direct economic interest in the procurement. In challenges of the agency's source selection decision, this generally means an offeror that potentially would be in line for award if its protest were sustained.

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Who May Participate?

- In addition to the protester and agency, intervenors may also participate in the litigation.
- In protests relating to the agency's source selection, only the awardee (or apparent successful offeror if no award has been made) may participate as an intervenor.

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Timeliness

- Protests concerning solicitation improprieties must be filed before the deadline for submitting bids or proposals.
- All other protests must be filed within 10 days of when the protester is, or should be, aware of its basis for protest. This rule also applies to supplemental bases for protest that are learned about during the litigation.



Hearings

- GAO does not conduct hearings in every case.
- GAO **WILL** conduct a hearing where testimony is required to resolve a material issue of fact necessary to the outcome of the litigation.
- GAO **MAY** conduct a hearing where the protest is technically complex and testimony could be useful to understanding the dispute, or where the protest involves novel legal issues and GAO could benefit from a discussion among the parties.

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Protection of Confidential Information

- GAO has legal authority to issue **protective orders** (essentially nondisclosure agreements).
- GAO allows independent individuals (attorneys and experts) to apply for admission to protective order.
- Only individuals that are not involved in competitive decision making on behalf of a participating party will be granted admission.
- Individuals admitted to protective order may participate fully in hearings, conference calls, and review of documents.
- Where party has no qualifying attorney or expert, it receives a “redacted” (edited) copy of agency documents.

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Decisions: The Practice at GAO

- GAO publishes its decisions (including on the Web) immediately.
- Competition-sensitive information is “redacted.”
- Unsuccessful party may ask GAO to reconsider.
- GAO decisions cannot be appealed.
- Unsuccessful protester may go to Court of Federal Claims.

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Additional Information

- WWW.GAO.GOV
- Click on “Legal Products”
 - Bid Protest Decisions
 - GAO’s Descriptive Guide and Bid Protest Regulations
 - GAO’s On-Line Docket

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